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In the Supreme Court of the United States

OCTOBER TERM, 1958

EDGAR ALLEN WEST, PETITIONER

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1958.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 541

EDGAR ALLEN WEST, PETITIONER

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 12a)[1] is reported at 143 F. Supp. 473. The opinion of the Court of Appeals for the Third Circuit (Pet. 23–27) is reported at 256 F. 2d 671.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1958. On September 9, 1958, Mr. Justice Brennan entered an order extending the time for filing a petition for a writ of certiorari in this case until

[1] "Pet. App." refers to petitioner's appendix in the Third Circuit.

November 29, 1958. The petition for a writ of certiorari was filed on November 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether both courts below correctly declined to permit recovery against a shipowner of a deactivated vessel—undergoing complete reactivating repairs while tied to a pier—for an alleged breach of a warranty of seaworthiness in a suit brought by a shoreside marine engineer, employed by the ship repair contractor, where at the time of the injury the libelant was engaged in performing major repairs and was injured by an article which was among the items specified to be inspected, repaired, and tested by the ship repair contractor.

2. Whether both courts correctly held that the shipowner was not negligent in the circumstances of this case.

STATEMENT

This action, filed pursuant to the Public Vessels Act, 46 U. S. C. 781, *et seq.*, was instituted by petitioner by a libel *in personam* against the United States as owner of the liberty ship, S. S. "MARY AUSTIN" (Pet. App. 3a). The United States impleaded the reactivation repair contractor, libelant's employer, Atlantic Port Contractors, Inc. (Res. App. 112b).[2] The libel alleged that the vessel was unseaworthy, that employees of the respondent were negligent, and that the respondent had failed to provide petitioner with

[2] "Res. App." refers to respondent's appendix in the Third Circuit.

a reasonably safe place to work (Pet. App. 4a). The undisputed basic facts, as found by the District Court and the Court of Appeals, are as follows:

After World War II, the "MARY AUSTIN" was completely deactivated and placed in "moth balls" at Norfolk, Virginia. In furtherance of the deactivating process, all water pipes, boilers, and tanks were drained, and then a special oil preservative was run through the system to prevent it from rusting (Pet. App. 13a; Pet. 24).

Shortly after the initiation of the Korean hostilities, the "MARY AUSTIN" was ordered reactivated, and the contract for that job was let to Atlantic Port Contractors, Inc. Under the terms of this contract, Atlantic was to overhaul the vessel completely and was specifically required to clean and repair all water lines, to replace all defective or missing plugs, and to test all lines before placing them in active operating condition (Pet. App. 13a; Pet. 24).

The contract further provided that the vessel be delivered into the possession of Atlantic, which was to have complete responsibility for and control over the manner in which the work was to be done. In order to insure compliance with the contract, the United States reserved the right to inspect Atlantic's work while it was in progress (Pet. App. 14a).

On November 5, 1951, the "MARY AUSTIN" was towed to Philadelphia, Pennsylvania, and tied alongside a pier. The vessel remained tied to the pier from November 7, 1951, until the completion of the repairs on December 11, and in accordance with the terms of the contract the manner and progress of the repairs

were under the complete control of Atlantic during that interval (Pet. App. 14a; Pet. 24).

The libelant was hired by the Atlantic Port Contractors, Inc., as a marine engineer (Pet. App. 12a). On November 21, 1951, libelant was working inside the low pressure cylinder of the main engine. He was struck on his left knee by a metal plug which was forced out of an overhead water pipe when a fellow employee of the repair contractor unexpectedly turned on the water (Pet. App. 16a; Pet. 24).

The District Court specifically found that respondent was not guilty of negligence; that the S. S. MARY AUSTIN was in satisfactory condition for reactivation purposes and was not unseaworthy; and that, in any event, the warranty of seaworthiness did not extend to a specialist like petitioner engaged in major repairs on the vessel (Pet. App. 19a). The court emphasized the fact that the work being done by petitioner—major repairs on a complex engine—was not the type of work that was ordinarily performed by seamen, but was more in the nature of home port structural repairs (Pet. App. 23a).

On appeal, the Court of Appeals for the Third Circuit affirmed (256 F. 2d 671). The court agreed with the District Court that respondent was not negligent as to the warranty of seaworthiness; the court found analogous the recent decisions of the Fourth Circuit in *Raidy* v. *United States*, 252 F. 2d 117, certiorari denied, 356 U. S. 973, and the Ninth Circuit in *Berryhill* v. *Pacific Far East Line, Inc.*, 238 F. 2d 385, certiorari denied, 354 U. S. 938. In each of the three cases, a shoreside specialist was engaged in ma-

jor repairs to a vessel "laid up" for complete rehabilitation. And, as previously determined by the Ninth and Fourth Circuits, the court below held that such work was not traditionally accomplished by members of the crew and was not encompassed, therefore, within the protection of the seaworthiness warranty.

ARGUMENT

The District Court and the Court of Appeals correctly held that, under the controlling principle for recovery on the basis of unseaworthiness as established by this Court in *Seas Shipping Co., Inc.* v. *Sieracki,* 328 U. S. 85, and applied by this Court in subsequent decisions,[3] a shipowner is not liable in the circumstances of this case. The decisions below are in conformity with the rule of those cases, *i. e.*, that while the warranty of seaworthiness is not restricted exclusively to seamen, those who are entitled to its protection must be doing seamen's work and incurring seamen's hazards. Contrary to petitioner's position, there is no true conflict with the decisions of this Court, or with decisions of other courts of appeals which have consistently applied this principle to varying factual situations. Indeed, the rulings here were expressly based on, and are in accord with, the recent decision of the Court of Appeals for the Fourth Circuit in *Raidy* v. *United States*, 252 F. 2d 117, involving substantially identical facts, in which this Court recently denied a petition for a writ of certiorari, 356 U. S. 973. Petitioner's contention of con-

[3] *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, affirming, *per curiam*, *Petterson* v. *Alaska Steamship Co.*, 205 F. 2d 478 (C. A. 9).

flict with other decisions in regard to that part of the holding exonerating the United States from negligence is equally unfounded. There is no occasion for further review.

1. (*a*). It has been established by this Court that a shipowner's obligation to provide a seaworthy ship extends to individuals other than seamen if, at the time of the injury, they were doing seamen's work and were exposed to seamen's hazards.[1] *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85, 95, 99. In two subsequent decisions, the Court has reaffirmed this position. In *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, the libelant was injured while performing minor repairs on the loading equipment. This Court, in affirming the holding of the Court of Appeals permitting recovery on the ground of unseaworthiness, expressly predicated its decision on the ground that the repair involved was inextricably related to the loading process itself, work considered traditionally and historically within the scope of the crew's duties. And in *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, the Court affirmed, *per curiam* and without opinion, a decision of the Ninth Circuit granting the protection of the warranty of seaworthiness to a workman injured by a breaking block, also while engaged in the ship's service of loading and unloading.[2]

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[1] In *Sieracki*, the libelant was a stevedore injured while aboard and loading the shipowner's vessel.

Petterson v. *Alaska Steamship Co.*, 205 F. 2d 478.

[2] While the block apparently belonged to the stevedoring company, that company had been offered the option by the shipowner of using its own or the ship's block, thus providing the basis for considering the equipment that of the ship. See

Thus, each of the relevant pronouncements by this Court has been limited to the factual context of work considered by the Court to be an historical function of the seamen. None of these decisions provides a basis for petitioner's suggestion that the guiding criterion of "ship's service" encompasses any and all work accomplished by workmen on a vessel, whether or not the work is part of major repair which was not historically the work of seamen. To the contrary, in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190, this Court indicated that work which would customarily be done by exclusively shore-based personnel would not constitute seamen's work. The Court noted that (342 U. S. at 190): "[t]he work in which the decedent was engaged at the time of his death quite clearly was not that usually done by a 'seaman.'" In the *Desper* case, the vessels were not afloat and had neither captain nor crew. In the instant action, it is true that the "MARY AUSTIN" was afloat but it was similarly unmanned and, having been completely deactivated, it was as much removed from navigation as if it had been physically removed from the water.

There is no question that both the District Court and the Court of Appeals correctly determined that the work in which the libelant was employed was not historically that of a seaman. Petitioner does not question this fact anywhere in his petition for certiorari, but instead relies upon the argument that the warranty of seaworthiness runs to anyone who is doing any manner of work on a vessel, irrespective

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Berryhill v. *Pacific Far East Line*, 238 F. 2d 385, 387 (C. A. 9), certiorari denied, 354 U. S. 938.

of whether it is in active use. Seamen have made minor repairs, but major repairs which require that the vessel be tied alongside a dock so that highly trained specialists, including marine engineers, may work on her are not within the normal purview of a seaman's duties.[7]

(*b*) Petitioner's assertion of a true conflict in decision between the ruling below and those of other courts of appeals is unfounded. On the contrary, both the Ninth and Fourth Circuits have recently been presented with cases involving substantially identical factual situations. *E. g., Berryhill* v. *Pacific Far East Line*, 238 F. 2d 285 (C. A. 9), certiorari denied, 354 U. S. 938; *Raidy* v. *United States*, 252 F. 2d 117 (C. A. 4), certiorari denied, 356 U. S. 973.

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[7] Indeed, aside from the question of the extension of the *Sieracki* rule, it is a misnomer to speak of the defective plug here as unseaworthiness of the ship. Cf. *Raidy* v. *United States*, *supra*. The seaworthiness of a vessel and her equipment is a relative concept "dependent in each instance upon the circumstances in which its fitness is drawn in question." *Lester* v. *United States*, 234 F. 2d 625, 628, certiorari granted, 352 U. S. 889, certiorari later dismissed by stipulation. Where one of the specific purposes for which the vessel was brought in for repair, as it was here, was the replacement of all defective and missing plugs, it seems clear that the vessel was reasonably fit for the purpose of rehabilitation and was not unseaworthy with regard to the defective plug. See *Lester* v. *United States*, *supra*; *Raidy* v. *United States*, *supra*; see also *Boudoin* v. *Lykes Bros. S. S. Co., Inc.*, 348 U. S. 336. It would be anomalous to suggest that a vessel was unseaworthy for the purposes of repair because of the faulty condition of an item which the shipowner had specifically detailed to be repaired. See *Lester* v. *United States*, *supra*. Thus, the District Court's finding that the vessel was not unseaworthy was adequately supported and binding on the Court of Appeals under the rule of *McAllister* v. *United States*, 348 U. S. 19.

In both these cases, the courts refused to apply the warranty of seaworthiness to an injured worker who was performing *major repairs* on a vessel, because in that capacity he was not performing a function which had ever been performed by seamen.

As for the cases which petitioner cites as being in conflict, they are distinguishable. For example, in *United States* v. *Lindgren*, 28 F. 2d 725 (C. A. 4), affirmed, 281 U. S. 38, determined long before *Sieracki*, the court emphasized that there was an uncontradicted allegation in the pleadings that the decedent, at the time of his death, "was engaged in his duties as third mate and as such a seaman on said steamship", and therefore that this fact was conclusively determined for purposes of that trial. 28 F. 2d at 728. This is in direct contrast to the situation here where the petitioner has no connection with any voyage of the vessel and was not an officer of the ship.

The Second Circuit decision in *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Ass'n*, 251 F. 2d 708, pending on writ of certiorari, No. 56, this Term, was expressly predicated upon the court's finding that the libelant was engaged in work that was traditionally that of a seaman. The court stated (251 F. 2d at 711):

> * * * We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot* v. *Hawn*, *supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means

> employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot* v. *Hawn, supra*.

We do not agree with the reasoning or the result in that case (see the Government's *amicus curiae* brief in No. 56), but the *Sieracki* rule must be fitted to innumerable factual situations, and differences in results, reached by applying the same controlling principle of law, cannot be characterized as a "conflict". See *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393.

That there is probably no conflict in principle between the Second Circuit and the Third Circuit is emphasized by another decision of the former court, entered the same day as *Halecki*, in *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717 (C. A. 2), certiorari denied, 356 U. S. 958. In that case, the court held that there was no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead, who was injured by an unseaworthy condition of the vessel, because "the reconstruction of a ship was not traditionally the task of the crew."

We submit that there is no conflict in principle with decisions of this Court or of other courts of appeals on the *Sieracki* doctrine. There are differences in facts, and possibly some difference in approach. But the courts below properly found that, upon careful examination of the factual situation in this case, petitioner's work and the circumstances of his injury

were removed from the standard of liability established in *Sieracki* and subsequent decisions.

2. Petitioner also contends that the ruling exonerating the respondent from liability for negligence presents a conflict with decisions of other courts of appeals. The District Court, after a detailed treatment of the facts surrounding the contract of reactivation, the limited right of inspection afforded the respondent under the contract, the accident itself, and the condition of the ship, found that there was no negligence on the part of the respondent. This finding with regard to negligence was amply supported by the record and was properly upheld by the Court of Appeals which is bound by the decision of the District Court unless that decision is clearly erroneous. *McAllister* v. *United States, supra.* Thus, there is no basis for petitioner's contention that the holding with regard to negligence was in conflict with the decisions of other circuits.[8] To the contrary, since both the District Court and the Court of Appeals found that the respondent was not negligent, this case calls for the application of the two-court rule. *Comstock* v. *Group of Investors*, 335 U. S. 211, 214; *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 51.

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[8] Petitioner's arguments (Pet. 17–19) with regard to the failure of the vessel here to provide a safe place to work are predicated exclusively on cases dealing with the warranty of seaworthiness rather than negligence. And, as demonstrated in fn. 7, *supra*, p. 8, that duty is not breached where, as here, the defective plug causing the accident was one of the items specified by the vessel to the contractor as needing repair.